



Supreme Court Dobbs Opinion Released Overruling Roe v. Wade and the Impact on Group Health Plans

On June 24, the Supreme Court of the United States (SCOTUS) overturned *Roe v. Wade* and *Planned Parenthood v. Casey* in the opinion [Dobbs v. Jackson Women's Health Organization](#). The holding of the Dobbs case eliminates a woman's federal constitutional right to abortion and therefore returns the abortion issue back to the states to regulate.

For our prior discussion of employer options and the impact on group health plans as a result of this Dobbs opinion—including the interaction of federal laws, state laws and group health plan funding, please see our article, "[Leaked Supreme Court Opinion Overruling Roe v. Wade and Impact on Group Health Plans](#)".

Generally, the main factors that impact a group health plan's policies and coverage for abortion include: (1) whether the group health plan is self-funded or fully insured and (2) the state(s) in which the employer and employees are located.

- › Self-funded plans are regulated by federal ERISA law that generally preempts state laws and state insurance regulations. Therefore, a self-funded plan has discretion over coverage for abortion and reimbursement for travel expenses related to abortion (discussed more below). If a plan sponsor wishes for their self-funded plan to cover abortions, participants would still be restricted in states that have laws limiting or regulating abortion providers or limit the ability of individuals to receive an abortion. So, employers should ensure that any abortion benefit offered under a self-funded plan is limited to benefits to procure a legal abortion in compliance with the laws of the state in which the medical services are rendered. If complications arise during an abortion, such as excessive hemorrhaging, plans are required to pay those costs attributable to such complications. However, the plan is not required to pay for the abortion itself, unless the life of the mother would be endangered if the fetus were to be carried to term.

Employers who wish to help pay/reimburse employee travel expenses to states where abortion is still legal may do so but should be careful to navigate around potential compliance pitfalls. For example, an employer who wishes to provide this benefit on a pre-tax basis should make sure to use a permissible, pre-tax mechanism.

Group health plans, HRAs, HSA, and FSAs can reimburse “medical care” as defined under IRC Section 213(d). Medical care under Section 213(d) includes for transportation primarily for and essential to medical care and for lodging (not to exceed \$50 per night per individual) while away from home primarily for and essential to medical care. Therefore, an employer may choose to reimburse employees for travel and lodging for medical care (including abortions) through a self-funded medical plan (including through an HRA).

Steps for an employer wishing to cover or reimburse travel expenses related to abortion include, but are not limited to:

- › Amending a self-funded medical plan to include coverage for travel expenses.
- › Implementing or amending a (self-funded) HRA to include reimbursement for travel expenses.

Non-benefit Eligible Employees, Direct Pay and EAPs

For employees who are not benefit eligible (or not enrolled), it may be possible to implement a policy to reimburse travel expenses related to abortion care. However, it is unclear if a travel reimbursement policy in of itself may create an (inadvertent) ERISA group health plan because “medical care” includes in its definition “transportation primarily for and essential to medical care.” The travel benefit policy could arguably be crafted as an EAP excepted benefit, structured as a broader travel benefit not primarily for medical care, or reimbursed on an after-tax basis as imputed income—potentially avoiding ERISA compliance complications. The GBS compliance team is watching for possible future regulatory agency guidance that could help clarify this issue.

ERISA Requirements

Employers should be aware of general ERISA plan compliance requirements if looking to make plan changes associated with abortion coverage or reimbursement of travel expenses through a self-funded medical plan or HRA, especially if making a change mid-plan year. For example: make sure to amend the plan document; provide summary of material modification (SMM), or full amended summary plan description (SPD), to plan participants; draft plan document and SPD if implementing a new HRA (and engage with vendor to conduct nondiscrimination testing); provide notice of material modification for mid-year plan change; and make sure the HRA is appropriately integrated with the group health plan to avoid ACA compliance issues.

Additional State Law Considerations

There are some states that bar entities from aiding and abetting the performance of an abortion (e.g., Texas and Oklahoma). It might be argued that an employer or employer benefit plan might violate these laws if it, for example, reimburses a Texas-based employee for an abortion received in another state (or for the related travel costs). However, it is unlikely an employer would face risk under these aiding and abetting laws for a few reasons: (1) because of ERISA preemption of state laws (to the extent an employer reimburses medical, surgical, and travel costs associated with an abortion through a group health plan or HRA), (2) because of the general presumption against the extraterritorial application of state laws, and (3) because of other constitutional concerns.

Developing Law

Issues involving abortion, abortion coverage, and travel for abortions will be developing and changing because of this SCOTUS Dobbs opinion that formally overturns Roe. Various states will pass new laws limiting abortion. Other states will pass laws expanding or protecting abortion access. Employers should continue to monitor the situation closely and engage with competent legal counsel if you have any questions.